

STATE OF MICHIGAN
COURT OF APPEALS

ALVIN ASHBAKER,

Plaintiff-Appellee,

v

JUDITH ASHBAKER,

Defendant-Appellant.

UNPUBLISHED

October 18, 2011

No. 296947

Genesee Circuit Court

LC No. 07-276537-DO

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce. On appeal, defendant argues that the trial court's spousal support award of \$300 a month for 48 months is inequitable and that the trial court erred by denying her request for additional attorney fees and costs. We affirm.

The parties were married in 1993 and separated in 2007. During that time, plaintiff ran a successful masonry business. Defendant was initially employed as a licensed hairdresser, but eventually began working in the office of the masonry business. After the parties separated, plaintiff, who was approaching retirement age, sought to sell his masonry business because deteriorating economic conditions, as well as his age and health problems, limited his ability to run a profitable business. The trial court generally divided the marital assets equally and also determined that the masonry business was a marital asset that was to be sold and the proceeds divided equally.

I. ATTORNEY FEES

Defendant first argues that the trial court erred by denying her request for additional attorney fees. This Court reviews a trial court's decision on a request for attorney fees for an abuse of discretion. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). The trial court abuses its discretion when its decision results in an outcome that falls outside the range of reasonable and principled outcomes. *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008). Any factual findings made by the court are reviewed for clear error, whereas any questions of law are reviewed de novo. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005).

In a divorce action, attorney fees are not recoverable as of right, but may be awarded where necessary to preserve a party's ability to carry on or defend the action. *Id.* "The reason

for the rule is that no party should have to invade the assets the party relies on for support in order to obtain representation.” *Olson v Olson*, 256 Mich App 619, 635; 671 NW2d 64 (2003). “The property division and the award of attorney fees ‘function in tandem,’ and a party may be ordered to pay the opposing party’s attorney fees if the opposing party was awarded insufficient liquid assets in the property division to pay the fees and costs.” *Woodington v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63 (2010).

MCR 3.206(C)(2) provides:

A party who requests attorney fees and expenses must allege facts sufficient to show that

(a) the party is unable to bear the expense of the action, and that the other party is able to pay, or

(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

Thus, defendant had the burden to show facts sufficient to justify an award of attorney fees. *Woodington*, 288 Mich App at 370.

The trial court awarded plaintiff attorney fees of \$1,500 early in the case, and it also required plaintiff to pay \$3,200 toward the cost of hiring an expert witness, but reserved ruling on any request for additional attorney fees until it heard the trial evidence. At the conclusion of the case, the court refused to award defendant additional attorney fees and ruled that each party would be responsible for their own fees. We conclude that the court did not abuse its discretion.

Defendant was awarded substantial spousal support during the pendency of the case to enable her to meet her expenses. Although plaintiff fell behind in his support payments, he remained liable for the arrearage. In addition, defendant was awarded liquid assets as part of the property division that was not required for her support. Moreover, defendant was awarded the marital home, and plaintiff was ordered to pay off the outstanding mortgage balance, thereby substantially reducing defendant’s housing expense. Considering the assets that were awarded to defendant as part of the property division, defendant has not demonstrated that she was unable to pay her own attorney fees.

Further, defendant has not shown that plaintiff had the ability to pay her substantial attorney fees. The trial court allowed plaintiff’s masonry business to be sold. The sale benefited both parties because the trial court ordered the sale proceeds to be divided equally. But plaintiff will no longer have the same income-producing ability that he had before. Further, plaintiff was also liable for spousal support and the mortgage payments on the marital home that was awarded to defendant. Defendant did not adequately show that plaintiff had the ability to pay for her attorney fees.

Although attorney fees may also be awarded where the opposing party engages in misconduct, *Reed*, 265 Mich App at 165, MCR 3.206(C)(2)(b), no showing of misconduct to justify an award of attorney fees was made here.

Accordingly, the trial court did not abuse its discretion in denying defendant's request for additional attorney fees.

II. SPOUSAL SUPPORT

Defendant also argues that the trial court's award of spousal support was inadequate. The standard by which this Court reviews a spousal support award was summarized as follows in *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000):

We review the trial court's factual findings relating to the award or modification of alimony for clear error. *Mitchell v Mitchell*, 198 Mich App 393, 396; 499 NW2d 386 (1993). A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made. *Id.* If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts. *Id.*

The main purpose of spousal support is to balance the incomes and needs of the parties without impoverishing either party. *Moore*, 242 Mich App at 654. An award of spousal support "is to be based on what is just and reasonable under the circumstances of the case." *Id.*; see also MCL 552.23(1). Among the factors a court should consider in determining whether to award spousal support are:

(1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Olson*, 256 Mich App at 631.]

The court may consider any other relevant circumstances. *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996).

In this case, the trial court considered most of the relevant factors. Defendant argues that the amount of support awarded is inadequate because: (1) the court did not make any provision for healthcare insurance; (2) the court's findings regarding defendant's work as a hairdresser failed to take into account that she was only earning \$50 to \$60 a month and had lost most of her clients when she went to work for plaintiff's masonry business; and (3) there was no evidence that plaintiff's health concerns hindered his ability to continue to work in the masonry business.

Defendant is correct that the trial court did not explicitly address the issue of healthcare coverage. However, the evidence at trial showed that defendant's healthcare coverage was provided through plaintiff's business and that the parties contemplated that said coverage would no longer be an option if the business was sold. Although defendant testified that she would require additional funds if she was required to pay for her own healthcare insurance, her estimated monthly expenses apparently included the cost of the monthly mortgage payment for

the marital home. The trial court ultimately held plaintiff responsible for the mortgage payments, thereby reducing plaintiff's housing expense and allowing those funds to be used for healthcare coverage. Under these circumstances, the fact that defendant must bear the cost of her own healthcare coverage does not render the spousal support award inequitable.

Defendant also argues that the trial court's spousal support award is inequitable because she was only earning \$50 to \$60 a month as a hairdresser. At the time of trial, however, defendant was working as a bookkeeper and earning just over \$1,200 a month. Although defendant questioned whether that job would continue, it was clear that defendant had the ability to work at the time of trial. Further, it was not unreasonable for the trial court to conclude that, given defendant's ability to work, she would be able to transition back to working as a hairdresser and begin to again build up a client base to support herself in the future. The fact that defendant was not regularly working as a hairdresser at the time of trial did not preclude the court from considering her ability to work in that field in the future.

We also disagree with defendant's suggestion that the trial court's spousal support award is inequitable because the court should have imputed income to plaintiff or recognized his ability to earn an income by continuing to work in the masonry business for his sons. A court may consider a party's voluntary reduction of income in determining the amount of spousal support. *Moore*, 242 Mich App at 655. If the court finds that a party voluntarily reduced his income, the court may impute additional income to that party to arrive at an appropriate award. *Id.* In this case, the trial court noted that because it was allowing plaintiff to sell his business, his future income would be limited. His only stable source of income would be from social security benefits. The court determined that a larger permanent award of spousal support was not justified in light of plaintiff's limited ability to earn an income and pay support.

Although defendant argues that plaintiff is still able to physically work in the masonry business, it is undisputed that he was approaching retirement age when he decided to sell his business and that he had elected to receive social security benefits upon turning age 62 in November 2008. Further, evidence was presented that plaintiff's health had deteriorated and that business had declined in recent years because of poor economic conditions, making it difficult to run a profitable business even if plaintiff was capable of continuing to run it. Under these circumstances, the trial court did not err by failing to impute income to plaintiff for purposes of determining spousal support. Further, even if plaintiff would be able to assist his sons in the operation of their masonry business, the evidence did not show that any income from that endeavor was likely to be substantial.

For these reasons, defendant has failed to show that the trial court's spousal support award is unfair and inequitable in light of the facts.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Christopher M. Murray